

STATE OF NEW HAMPSHIRE
WATER COUNCIL

RECEIVED

Docket No. 03-10-WC

JUN 30 2005

Appeal of the Conservation Law Foundation
In Re: Water Quality Certificate No. 2003-001

**CONSERVATION LAW FOUNDATION'S MEMORANDUM OF LAW
IN SUPPORT OF "GROUND I" OF ITS NOTICE OF APPEAL**

NOW COMES the Conservation Law Foundation (CLF) and respectfully submits this Memorandum of Law in accordance with the Water Council's June 15, 2005 Appeal Hearing Notice:

Procedural Background

This appeal involves the Department of Environmental Services' ("Department") issuance of a Section 401 Water Quality Certificate for the proposed construction of a 79-lot residential subdivision in Greenland. The proposed project includes a substantial network of roadways and house lots on a 212-acre parcel rich with wetlands and other important aquatic resources, including Norton Brook, a tributary to the Winnicut River, which flows into Great Bay.

On August 18, 2003, CLF initiated this appeal on numerous grounds. *See* Notice of Appeal. As the first ground of its Notice of Appeal, CLF challenges the lawfulness of the Section 401 decision because the Department conducted its Section 401 review under **expired rules** and, therefore, lacked legal authority to consider and grant the subject Water Quality Certificate. Pursuant to the Water Council's June 15, 2005 Appeal Hearing Notice, this memorandum addresses this distinct legal issue.

Legal Overview: Section 401 of the Clean Water Act

Because of the size and significant impacts of the proposed project, the U.S. Army Corps of Engineers has required an "individual" federal wetlands permit under Section 404 of the federal Clean Water Act (CWA). This requirement, in turn, triggers the requirement of Section 401 of the CWA, which states:

Any applicant for a federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this title.

Water Quality Certificate # 2003-001, Finding B-1 (*quoting* 33 U.S.C. § 1341(a)(1) [CWA § 401(a)(1)]). Among these requirements, certification must be obtained that the proposed project will not result in a violation of the State's water quality standards.

With respect to the certification process, the CWA mandates that States providing certification under Section 401 "shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications." 33 U.S.C. § 1341(a)(1) [CWA § 401(a)(1)]. It further states:

In any case where a State . . . has no authority to give such a [Section 401] certification, such certification shall be from the Administrator [of the U.S. Environmental Protection Agency]. . . . No license or permit [i.e., in this case, a federal wetlands permit under Section 404 of the CWA] shall be granted if certification has been denied by the State . . . or the Administrator, as the case may be.

Id.

The Pertinent Facts

On April 29, 2003, the Department received an application for a Section 401 Water Quality Certificate for the proposed project. On July 17, 2003, the Department granted the Section 401 Water Quality Certificate at issue in this appeal. The Department's decision contains numerous references to the Department's "401 Water Quality Regulations," which were codified as Env-Ws 451-455. For example, the decision is captioned with the following title:

WATER QUALITY CERTIFICATE
In Fulfillment of
NHDES 401 Water Quality Regulations (Env-Ws 451-455)
and
Section 401 of the United States Clean Water Act (33 U.S.C. 1341)

See 401 Certificate #2003-001 at 1 (*italics added*). The decision also states:

Env-Ws 451-455, *401 Water Quality Certification Regulations*, effective March 6, 1995, adopted by NHDES under the authority of RSA 485-A:6, VII, provides for the implementation of Section 401 in the State of New Hampshire.

Id. ¶ B-1 (*italics in original*). The decision contains many other references to the Department's Section 401 regulations, including the following language:

E. WATER QUALITY CERTIFICATION APPROVAL

Based on the determinations and conditions noted above, NHDES hereby issues this Water Quality Certificate in accordance with NHDES 401 Water Quality Certification Regulations (Env-Ws 451 – 455) and Section 401 of the United States Clean Water Act (33 U.S.C. 1341).

Id. at 4.

Despite its repeated reference to, and reliance upon, Env-Ws 451 – 455, the Department's Section 401 rules **were not in effect at any time during the Department's Section 401 review and certification of the proposed project**. Rather, pursuant to the unambiguous language of New Hampshire's Administrative Procedure Act, the Department's Section 401 rules – which became effective on March 6, 1995 – had **expired** on March 6, 2003. RSA 541-A:17,I (“No rule shall be effective for a period of longer than 8 years, but the agency may adopt an identical rule under RSA 541-A:5 through RSA 541-A:14, in conformance with the drafting and procedure manual adopted under RSA 541-A:8.”).

Argument

The Department had no legal authority to act upon and issue a Section 401 Water Quality Certificate because its rules had expired, and because it lacked statutory authority to act in the absence of rules.

- (1) The Department failed to comply with New Hampshire's Administrative Procedures Act, causing the expiration of its rules.**

New Hampshire's Administrative Procedures Act (APA) sets forth detailed provisions for the adoption of administrative rules. Those provisions include important, mandatory opportunities for public hearing and comment, and for review by the legislature's Joint Legislative Committee on Administrative Rules. RSA 541-A:11; RSA 541-A:13. As stated above, the APA makes clear that no rule shall be effective for a period longer than 8 years. RSA 541-A:17,I.

Prior to or upon expiration of rules, agencies such as the Department may re-adopt rules by following the APA's process, including the requirements of holding a public hearing and obtaining public comment, and providing review by the legislature's Joint Legislative Committee on Administrative Rules. The Department failed to comply with the clear mandates of the APA, causing its Section 401 regulations to expire on March 6, 2003, and resulting in the absence of rules during its review and final determination of the Section 401 Water Quality Certificate here at issue.¹

On October 31, 2003, several months after issuing the Water Quality Certificate here at issue, the Department sought to cure its lack of rules by filing an Interim Rulemaking Notice Form with the Office of Legislative Services, Division of Administrative Rules.² See Exhibit A. In its Interim Rulemaking Notice Form, the Department explained:

¹ CLF views the Section 401 Water Quality Certification process to be a critically important one for the protection of New Hampshire's water resources. Accordingly, had the Department adopted new Section 401 rules in compliance with the APA and prior to the expiration of the rules at issue, CLF would have participated in the public rulemaking process.

² The Department did so pursuant to RSA 541-A:19,I, which allows agencies to “adopt as an interim rule any rule which amends an existing rule, repeals an existing rule, or creates a new rule, which is designed solely to allow the agency to: . . . (d) Continue its rules which would otherwise expire prior to the completion of the readoption of the rules by the agency.”

The previous rules expired on March 6, 2003. The expired rules established procedures for obtaining certification from DES that the discharge from any federally permitted or licensed project will comply with State surface water quality standards, as required by the Clean Water Act § 401 (33 U.S.C. §1341). The procedures include a public notice process, 401 Certification application requirements, and criteria for certification. *The interim rules are needed to reestablish the 401 certification procedures pending readoption of the rules.*

See Exhibit A, ¶ 8 (emphasis added). The Department went on to further state:

If the rules are not adopted the state *would not have established procedures for people to follow to obtain certification from DES* that the discharges from their federally permitted or licensed projects will comply with State surface water quality standards, as required by the federal Clean Water Act § 401 (33 U.S.C. §1341).

Id. ¶ 11 (emphasis added). As the above statements make clear, **the Department has itself admitted that upon expiration of their rules, the Department had no Section 401 certification procedures, and that the adoption of interim rules was needed to “reestablish” such procedures.** (It is CLF’s understanding that the Department’s interim rules were adopted, but that they, too, have expired.³ The Department is in the process of re-working its Section 401 rules for adoption under the APA. At this time, however, the Department once again has no Section 401 rules in effect).

(2) The Department lacked statutory authority to conduct a Section 401 review in the absence of effective rules.

The New Hampshire Supreme Court has on several occasions held that where a state agency or other state body *has statutory authority to act on a matter*, the lack or expiration of rules is not fatal. For example, in *Nevins v. N.H. Department of Resources and Economic Development*, 147 N.H. 484 (2002), the plaintiffs challenged DRED’s construction of a mountaintop tower on the ground that the agency had not adopted rules governing the management of mountaintop communication facilities. In addressing this issue, the Supreme Court stated:

In *Stuart v. State*, 134 N.H. 702, 705, 597 A.2d 1076 (1991), we explained that promulgation of a rule pursuant to the APA rulemaking procedures is not necessary to carry out what a statute demands on its face. In *Smith v. New Hampshire Board of Examiners of Psychologists*, 138 N.H. 548, 553, 645 A.2d 651 (1994), we reiterated this rule in determining that, despite the expiration of its rules, the board of examiners of psychologists retained authority to initiate disciplinary hearings against the plaintiffs because of its “clear statutory authority to initiate and conduct disciplinary proceedings.”

³ According to the APA, interim rules “shall be effective for a period not to exceed 180 days.” RSA 541-A:19,X.

Nevins, 147 N.H. at 487. See also *Petition of Smith*, 139 N.H. 299, 307 (1994) (“Promulgation of a rule pursuant to RSA chapter 541-A is not necessary to carry out what a statute authorizes on its face.”).

Here, in sharp contrast to the above line of cases, the Department had no clear statutory authority to engage in Section 401 reviews. There is simply no state statute authorizing the Department to consider, and render determinations on, applications for Section 401 Water Quality Certificates. The Department’s lack of statutory authority is demonstrated by the following:

- In paragraph B-1 of its decision, the Department relies on RSA 485-A:6, VII as its statutory authority for adopting Env-Ws 451 – 455.
- RSA 485-A:6, VII, in turn, states that the Department shall adopt rules under the APA relative to “[t]he required information and prescribed conditions needed to implement the program described in RSA 485-A:13, I(a).”
- A review of RSA 485-A:13, I(a), in turn, reveals no mention whatsoever of Section 401 Water Quality Certificate reviews and determinations. To the contrary, the “program” described in RSA 485-A:13, I(a) is the State’s regulatory program specifically pertaining to water discharge permits. This program is wholly distinct from the *certification* reviews and determinations conducted pursuant to Section 401 of the CWA.

In light of the foregoing, the Department had no statutory authority enabling it to consider and issue a decision on the subject Section 401 Water Quality Certificate in the absence of legally effective rules. Accordingly, the certificate at issue must be considered invalid as a matter of law, and the matter either (1) remanded to the Department for a valid review and decision pursuant to new rules which the Department is considering for adoption pursuant to the APA, or (2) transferred to the EPA so that *it* can render a valid review and decision under Section 401.

Conclusion

The Department relied upon expired, legally ineffective regulations in conducting its Section 401 review and issuing the Section 401 Water Quality Certificate at issue. Because the Department had no statutory authority enabling it to conduct Section 401 reviews in the absence of rules, the Certificate is invalid as a matter of law. See *Nevins*, *supra*. The applicant’s request for a Section 401 Water Quality Certificate either must be transferred to the Administrator of the U.S. EPA, see 33 U.S.C. § 1341(a)(1) [CWA § 401(a)(1)], or it must be reconsidered by the Department after it adopts new rules in compliance with the APA.

Respectfully submitted,

Conservation Law Foundation

By:  **COPY**

Thomas F. Irwin, Esq.
27 North Main Street
Concord, NH 03301
(603) 225-3060

Date: June 30, 2005

CERTIFICATE OF SERVICE

A copy of this memorandum has this day been forwarded via U.S. Mail to Jennifer J. Patterson, Esq., and Malcolm R. McNeill, Jr., Esq.

 **COPY**
Thomas F. Irwin

EXHIBIT A

INTERIM RULEMAKING NOTICE FORM

Proposed Interim Rule Number _____

Rule Number Env-Ws 451-455

1. Agency Name & Address:

2. RSA Authority: 485-A:13 and 485-A:6,
VII

3. Federal Authority: Clean Water Act §401 (33
U.S.C. §1341)

4. Type of Action:

Adoption X

Amendment _____

Repeal _____

Readoption _____

Readoption w/amendment _____

5. Filing Date: 10/31/03

6. Short Title: 401 Water Quality Certification Procedures

7. Contact person for copies and questions including requests to accommodate persons with disabilities:

Name: Paul Currier

Title: Administrator, Watershed
Management Bureau

Address: DES
29 Hazen Drive
P.O. Box 95
Concord, NH 03302-0095

Phone #: 271-3289

Fax#: 271-7894

E-mail: pcurrier@des.state.nh.us

TTY/TDD Access: Relay NH 1-800-735-
2964 or dial 711 (in NH)

8. Summary explaining the effect of the rule:

The previous rules expired on March 6, 2003. The expired rules established procedures for obtaining certification from DES that the discharge from any federally permitted or licensed project will comply with State surface water quality standards, as required by the federal Clean Water Act §401 (33 U.S.C. §1341). The procedures include a public notice process, 401 Certification application requirements, and criteria for certification. The interim rules are needed to reestablish the 401 certification procedures pending readoption of the rules.

9. Listing of people, enterprises, and government agencies affected by the rule:

The rules apply to any person(s) seeking a federal permit or license (such as a federal wetlands permit or hydroelectric license) which may result in a discharge to surface waters of the state. Examples of discharges include, but are not limited to, runoff from construction projects, nonpoint source discharges from developed land, and releases from hydroelectric power projects

10. Specific section or sections of state statute or federal statute or regulation which the rule is intended to implement.

Rule Sections	State/Federal Statute
Env-Ws 451-455	RSA 485-A:13, I; 33 U.S.C. §1341 (federal Clean Water Act §401)

11. Summary of the effect upon the state if the rule were not adopted:

If the rules are not adopted the state would not have established procedures for people to follow to obtain certification from DES that the discharges from their federally permitted or licensed projects will comply with State surface water quality standards, as required by the federal Clean Water Act §401 (33 U.S.C. §1341).

12. Proposed date of review by the Joint Legislative Committee on Administrative Rules: Nov. 20, 2003

13. The fiscal impact statement prepared by the Legislative Budget Assistant

FIS # 03:160, dated 10/30/03 See attached.